

1 provide the Court with the required Prison Certificate. Because this Court cannot proceed until
 2 Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis, the Court
 3 **DISMISSES** the case without prejudice. See Rule 3(a), 28 U.S.C. foll. § 2254.

4 **FAILURE TO ALLEGE EXHAUSTION OF STATE JUDICIAL REMEDIES**

5 Further, habeas petitioners who wish to challenge either their state court conviction or the
 6 length of their confinement in state prison, must first exhaust state judicial remedies. 28 U.S.C.
 7 § 2254(b), (c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). To exhaust state judicial
 8 remedies, a California state prisoner must present the California Supreme Court with a fair
 9 opportunity to rule on the merits of every issue raised in his or her federal habeas petition. 28
 10 U.S.C. § 2254(b), (c); Granberry, 481 U.S. at 133-34. Moreover, to properly exhaust state court
 11 remedies a petitioner must allege, in state court, how one or more of his or her federal rights
 12 have been violated. The Supreme Court in Duncan v. Henry, 513 U.S. 364 (1995) reasoned:
 13 “If state courts are to be given the opportunity to correct alleged violations of prisoners’ federal
 14 rights, they must surely be alerted to the fact that the prisoners are asserting claims under the
 15 United States Constitution.” Id. at 365-66 (emphasis added). For example, “[i]f a habeas
 16 petitioner wishes to claim that an evidentiary ruling at a state court trial denied him [or her] the
 17 due process of law guaranteed by the Fourteenth Amendment, he [or she] must say so, not only
 18 in federal court, but in state court.” Id. at 366 (emphasis added).

19 Petitioner indicates that the claims alleged in the Petition have not been presented to the
 20 California Supreme Court. (Pet. at 6-7.) The burden of proving that a claim has been exhausted
 21 lies with the petitioner. Cartwright v. Cupp, 650 F.2d 1103, 1104 (9th Cir. 1981).

22 **FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM**

23 The Court would ordinarily provide Petitioner with the opportunity to satisfy the filing
 24 fee requirement and an opportunity to file an amended petition alleging exhaustion of state court
 25 remedies, if possible, in order to avoid dismissal. However, Petitioner has failed to allege that
 26 Petitioner’s state court conviction or sentence violates the Constitution of the United States, or
 27 that Petitioner is otherwise in custody in violation of federal law, and has therefore failed to state
 28 a claim cognizable on federal habeas.

1 Title 28, United States Code, § 2254(a), sets forth the following scope of review for
2 federal habeas corpus claims:

3 The Supreme Court, a Justice thereof, a circuit judge, or a district
4 court shall entertain an application for a writ of habeas corpus in
5 behalf of a person in custody pursuant to the judgment of a State
6 court only on the ground that he is in custody in violation of the
7 Constitution or laws or treaties of the United States.

8 28 U.S.C. § 2254(a) (emphasis added). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir.
9 1991); Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir. 1988); Kealohapauole v. Shimoda, 800
10 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim
11 under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of
12 a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the
13 United States.” See 28 U.S.C. § 2254(a).

14 Here, Petitioner alleges denial of access to legal and personal property, and denial of
15 access to the law library. (See Pet. at 6-7.) Challenges to the fact or duration of confinement
16 are properly brought in a petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254,
17 whereas challenges to conditions of confinement are brought pursuant to the Civil Rights Act,
18 42 U.S.C. § 1983. See Preiser v. Rodriguez, 411 U.S. 475, 488-500 (1973). When a state
19 prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he
20 or she seeks is a determination that he or she is entitled to immediate release or a speedier
21 release, the sole federal remedy is a writ of habeas corpus. Id. at 500. On the other hand, a
22 § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge
23 to the conditions of prison life, including denial of access to the courts and denial of access to
24 personal property, but not to the fact or length of custody. Id. at 499; McIntosh v. United States
25 Parole Comm’n, 115 F.3d 809, 811-12 (10th Cir. 1997).

26 Preiser left open the possibility of assertion of a conditions-of-confinement claim in a
27 habeas application where additional and unconstitutional restraints are at issue. See Preiser, 411
28 U.S. at 499 (“This is not to say that habeas corpus may not also be available to challenge such
29 prison conditions. When a prisoner is put under additional and unconstitutional restraints during
30 his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the

1 custody illegal.”) The allegations of lack of access to the law library and denial of access to
 2 personal and legal property are not the type of “additional and unconstitutional restraints” which
 3 are distinct from conditions of confinement, and Petitioner’s allegations therefore do not state
 4 a claim cognizable on federal habeas. Wilwording v. Swenson, 404 U.S. 249, 251 (1971);
 5 Tucker v. Carlson, 925 F.2d 330, 332 (9th Cir. 1991).

6 Rule 4 of the Rules Governing Section 2254 Cases provides for summary dismissal of a
 7 habeas petition “[i]f it plainly appears from the face of the petition and any attached exhibits that
 8 the petitioner is not entitled to relief in the district court . . .” Rule 4, 28 U.S.C. foll. § 2254.
 9 Here, it appears plain from the Petition that Petitioner is not presently entitled to federal habeas
 10 relief because Petitioner has failed to satisfy the filing fee requirement, failed to allege
 11 exhaustion of state court remedies, and failed to state a claim cognizable on federal habeas.
 12 Petitioner is free to present the claims alleged in the Petition in a separate civil rights complaint
 13 pursuant to 42 U.S.C. § 1983. which will be assigned a separate civil case number.


14 CONCLUSION AND ORDER

15 Accordingly, the Court **DISMISSES** the Petition without prejudice due to Petitioner’s
 16 failure to satisfy the filing fee requirement, failure to allege exhaustion of state court remedies,
 17 and failure to state a claim cognizable on federal habeas. The dismissal is without prejudice to
 18 Petitioner to present the claims in a civil rights complaint pursuant to 42 U.S.C. § 1983, rather
 19 than a habeas petition, which will be assigned a separate civil number. The Clerk of Court shall
 20 send Petitioner a blank Southern District of California civil rights Complaint form along with
 21 a copy of this Order.

22 The Clerk shall close the case.

23 **IT IS SO ORDERED.**

24 DATED: October 14, 2011

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 26 **WILLIAM Q. HAYES**
 27 United States District Judge
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